

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Appropriate Regulatory Treatment)	CS Docket No. 02-52
for Broadband Access to the Internet)	
Over Cable Facilities Facilities)	
)	

**COMMENTS OF FAIRFAX COUNTY, VIRGINIA, AND
DISTRICT OF COLUMBIA OFFICE OF CABLE TELEVISION
AND TELECOMMUNICATIONS**

Introduction

Fairfax County, Virginia, ("Fairfax County") and the District of Columbia Office of Cable Television and Telecommunications ("District") (collectively "The Parties") submit the following comments to the Federal Communications Commission ("FCC") in response to the FCC's Declaratory Ruling and Notice of Proposed Rulemaking regarding the regulatory classification of cable modem service. In its Declaratory Ruling ("Ruling"), the FCC classified cable modem service as an information service under Title I of the Cable Communications Policy Act of 1984 ("The Cable Act"). The Notice of Proposed Rulemaking ("Notice") went on to request comment on numerous policy, legal and practical issues that arise as a result of the Ruling.

The Parties encourage the development of competitive services and universal availability of access to high-speed networks for all County and District residents, but they object to removing cable modem service from the control of the local franchise authorities that have historically regulated cable companies. The Parties advocate the

continued application of customer service standards to cable modem service, just as they apply to other cable services. Additionally, The Parties comment on whether franchise fees collected prior to the Declaratory Ruling should be refunded or whether the FCC should cut off such claims as a matter of national communications policy.

Customer Service Standards¹

Customer service standards are a good example of regulations that apply to the cable operator and that should continue to apply even if cable modem service is redefined as an information service. The history of these regulations is instructive.

During the early years of cable television, an attempt at voluntary industry guidelines established by the NCTA failed to remedy customer service problems. As a result, based on the industry's voluntary guidelines, Congress created customer service standards for cable television operators in the Cable Communications Act of 1992 ("1992 Act"). The FCC used its regulatory authority to define specific minimum standards related to telephone availability, trained company representatives, telephone answering time, customer service and bill payment locations, installation and service interruption scheduling standards, and other obligations to the consumer.² Nonetheless, current FCC reports show that customer service complaints continue to be a problem.

In its most recent report on consumer complaints and inquiries,³ the Commission found that billing and rates complaints continue to head the list of consumer complaints for telecommunications and cable services. The FCC acknowledged in its report that

¹ The District will also file separate comments on its position regarding the application of customer service standards and related issues specific to the District of Columbia.

² 47 C.F.R. § 76.309.

³ Quarterly Report on Informal Consumer Complaints and Inquiries Received, 1st Quarter Calendar Year 2002, Released May 7, 2002.

local cable franchise authorities receive the bulk of cable-related complaints which, in Fairfax County, include complaints about cable modem service. Cable modem service uses the same cable facilities, billing system, and often the same customer service center as other cable services, so it makes sense to continue to apply customer service standards to the cable operator for both services. In these circumstances, it is not possible to make a cogent case that less stringent customer service standards should apply to the provision of cable modem service than to the provision of cable television services that are provided by the same cable operator. The proper regulatory stance here is to maintain the cable-related customer service standards, not provide a cable modem exemption from those standards.

Benefits Realized From Local Control of Customer Service Standards

The Parties believe that enforcement of customer service standards by the local franchise authority (based on federal guidelines) has improved service to customers. Fairfax County has used its authority under the franchise agreement to impose remedies for violations of customer service standards. Since these sanctions were imposed, the cable operator reports that it has increased staffing and training in the customer care call center, installed a state-of-the-art phone answering system to provide more efficient routing of customer calls, and hired more experienced personnel to improve internal processes to provide more timely and efficient customer service. Complaints to Fairfax County regarding customer relations and telephone response time were reduced by more than 50% in the first five months of 2002 when compared to the last five months of 2001.

The Declaratory Ruling Should be Applied Prospectively

The Parties urge the FCC to apply its regulatory classification of cable modem service as an information service prospectively, not retroactively. Until the issuance of the FCC's Declaratory Ruling, Fairfax County collected a franchise fee derived from cable modem service from its two county cable franchises. Since the Commission's ruling, both Fairfax County franchisees have stopped charging the franchise fee back to consumers on the cable modem portion of their cable bills, and in turn have stopped paying the franchise fee on cable modem service to the County.

As part of the Cable Act, Congress imposed a uniform federal standard on the level of franchise fees. Specifically, § 622 provides that for any one-year period, the franchise fees paid by a cable operator with respect to any cable system cannot exceed five percent of the operator's gross revenues derived from the operation of the cable system to provide cable service. The purpose of § 622 was consistent with the entirety of the Cable Act, which recites that one of its purposes is to establish a "national policy" concerning cable communications. 47 U.S.C. § 521(1).

Since 1986, the FCC has contended, correctly so, that the Commission and the courts have concurrent jurisdiction to resolve disputes arising under § 622. *In re Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 104 F.C.C.2d 386 (1986) ("Reconsideration Order"), ¶ 16.⁴ The Commission articulated a division of authority under which it would exercise its jurisdiction only in matters that directly impinge on a

⁴ *Aff'd on this point sub nom American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1573-75 (D.C. Cir. 1987), *cert. denied, sub nom. Connecticut v. FCC*, 485 U.S. 959 (1988).

national policy concerning cable communications and that call on the FCC's expertise, while the courts would decide all other matters. Reconsideration Order, ¶ 18. The Commission distinguished those issues that are national in scope and impact from those that are idiosyncratic to individual franchise agreements, local ordinances, and state laws. *Id.* It also distinguished those issues that are driven by national communications policy from those that require evidentiary showings that are traditionally within the expertise of courts to decide. *Id.* at ¶ 20. Those distinctions and considerations dictate in this instance that the FCC should exercise its jurisdiction under § 622 to resolve, on a national basis, disputes over whether franchise fees collected by cable companies and paid to local franchising authorities on cable modem revenues should be refunded.

The dispute arises as a direct and inevitable result of the FCC's Declaratory Ruling classifying cable modem service as an "information service" and explicitly not a "cable service." Moreover, the FCC's Declaratory Ruling was based on the Cable Act's definitions of the terms "information service," "cable service," and "telecommunications service." This clearly is a national issue, and the Declaratory Ruling should apply uniformly and nationally to all franchising authorities and cable operators.

The implementation and the consequences of the Ruling should likewise be uniform. Therefore, the FCC should exercise its jurisdiction and resolve the issue by declaring that franchise fees collected before the issuance of the Declaratory Ruling should not be subject to refund claims.

The FCC Should Rule that Franchise Fees Paid on Cable Modem Service Revenues Should Not be Refunded

As the FCC recognized in its Ruling, cable operators and franchising authorities could not have been expected to predict that the FCC would classify cable modem service

as other than a “cable service.” (Notice at ¶ 108.) The FCC’s statement is particularly true of Fairfax County, which is within the jurisdiction of the federal Eastern District of Virginia. Fairfax County’s franchise agreements with its cable operators required those operators to pay franchise fees on “cable service” revenues, and the cable operators all consented to treating cable modem service as a “cable service” for purposes of the franchise agreement. In May 2000, the U.S. District Court for the Eastern District of Virginia ruled that cable modem service is a “cable service” under the Cable Act.

MediaOne Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712 (E.D. Va. 2000).⁵ More than a year later, in July 2001, the U.S. Court of Appeals for the Fourth Circuit, at the suggestion of the FCC, declined to classify cable modem service, deferred to the expertise of the FCC and affirmed the case on different grounds. *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 365 (4th Cir. 2001).

The Parties urge the FCC to use its authority to ensure that local governments are not subject to litigation that would result in a patchwork of decisions and that would create hardship if local governments were required to repay cable-modem related franchise fees collected prior to the FCC's Ruling. Fairfax County distributes substantial portions of its franchise fee revenues, pursuant to franchise agreements, to the public schools, colleges, and the Fairfax Cable Access Corporation. It is not known whether the non-County beneficiaries of any retroactive distributions of franchise fees would participate in a refund. If the County is required by the FCC or a court to refund fees

⁵ Although the U.S. Court of Appeals for the Ninth Circuit ruled the following month that cable modem service was not a “cable service,” that decision had no precedential value beyond that federal Circuit. *AT&T Corporation v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). Rather, Fairfax County was bound by the *Henrico County* case decisions.

collected before the Declaratory Ruling, the County will have to find those revenues in its General Fund in a year when the County budget has been cut by five percent.

The County has also discussed with its two cable operators what procedures they would adopt for returning the franchise fee to customers if the County were to refund the fees to the operators. It appears that the operators could calculate the amount of franchise obligations passed on to subscribers, but they cannot guarantee their ability to identify the actual subscribers that paid such fees. In addition, the County would not be able to audit companies to ascertain compliance with the plans because of the federal prohibitions on disclosure of subscriber information. See 47 U.S.C. Sec. 551.

Therefore, Fairfax County does not think that customer interests would be served by a retroactive refund because individual customers who paid fees cannot be located, and Fairfax County would be under hardship to refund fees that have either already been disbursed to other beneficiaries or allocated to the County budget. Refunding fees retroactively would unnecessarily penalize the County for collecting fees in good faith and consistent with the law until the change in national policy created by the FCC's Declaratory Ruling of March 15, 2002.

Conclusion

In conclusion, The Parties 1) recommend that the FCC apply customer service and consumer protection standards created by the Cable Act of 1992 to cable modem service provided by cable operators. In so doing, the FCC would maintain the integrity of current provisions that are necessary and relevant to cable operators and consumers; and 2) recommend that the FCC apply its classification of cable modem service prospectively and not retroactively, and that the Commission use its authority to address the franchise fee issue, which is a direct result of a change in federal regulatory policy.

Respectfully submitted,

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